JD–118-04
Milwaukee, WI

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

MILWAUKEE DUSTLESS BRUSH COMPANY

Respondent

and Case 30–CA–16640

PAPER, ALLIED INDUSTRIAL, CHEMICAL AND
ENERGY WORKERS INTERNATIONAL
UNION (PACE) LOCAL 7-0852 AFL-CIO

Charging Party

Paul Bosanac, Esq. of Milwaukee, WI,
for the General Counsel.
Marianne Goldstein Robbins, Esq.,
(Previant, Goldberg, Uelmen, Gratz,
Miller & Brueggeman) of Milwaukee, WI,
for the Charging Party.
Thomas W. Scrivner, and C. Samuel Facey, Esqs.,
(Michael, Best & Friedrich) of Milwaukee, WI,
for the Respondent.

DECISION

Statement of the Case

Robert A. Giannasi, Administrative Law Judge. This case was tried in Milwaukee, Wisconsin on October 5 and 6, 2004. The complaint alleges that the Respondent violated Section 8(a)(3) and (1) of the Act by discriminatorily refusing to reinstate and locking out former striking employees; and Section 8(a)(5) and (1) by making changes in the wages, hours and other terms and conditions of crossover employees without notifying the Charging Party Union (hereafter the Union), the employees' bargaining representative, and giving it an opportunity to bargain over the changes. The Respondent filed an answer denying the essential allegations in the complaint. And, after the trial, the parties filed opening briefs and reply briefs, which I have read and considered.

Based on the entire record, including the testimony of the witnesses and my observation of their demeanor, I make the following:

Findings of Fact

I. Jurisdiction

Respondent, a Wisconsin corporation with an office and place of business in Milwaukee, Wisconsin, is engaged in the manufacture of industrial brushes. During a representative one-year period, Respondent sold and shipped goods and materials valued in excess of $50,000 directly to customers outside of Wisconsin. Accordingly, I find, as Respondent admits, that it is engaged in interstate commerce within the meaning of Section 2(2), (6) and (7) of the Act.

The Union is a labor organization within the meaning of Section 2(5) of the Act.

II. The Alleged Unfair Labor Practices

A. The Facts

1. Background: Parties Reach Impasse, Union Strikes and Crossovers Resign from the Union and Return to Work

Since 1990, Respondent has recognized the Union as the exclusive bargaining representative of the following appropriate unit: All factory employees engaged in production work, shipping and receiving, factory maintenance and repair, but excluding foremen, executive, administrative and clerical employees, guards and watchmen, and employees of temporary help agencies. This bargaining relationship has been embodied in successive collective bargaining agreements, the most recent of which was effective from June 28, 2000 through June 30, 2002. In June 2002, the parties began negotiations for a new contract and extended the old contract through December 31, 2002. The parties resumed bargaining in December 2002. On March 10, 2003, Respondent announced that the parties had reached an impasse, and also announced and implemented some of the terms contained in its December 19, 2002 "final offer." On that same date, the bargaining unit employees began an economic strike and set up a picket line (Tr. 47-48).

The Respondent continued to operate during the strike, initially utilizing management personnel and employees from temporary agencies. Beginning in April and continuing thereafter, the Respondent also hired new replacement employees.[1] Four of the roughly 30 striking employees crossed the Union's picket line and returned to work. Brian Domrose, who walked the picket line on March 11 (Tr. 98), returned to work on March 12. He was serving a sentence and incarcerated, but, under Wisconsin

[1] Contrary to Respondent, the Union takes the position (U. R. Br. 27-28) that those were temporary replacements. It alleges that, apart from conclusory representations by Respondent, there is no evidence as to whether the new employees were hired as permanent or temporary replacements. I agree that, on this record, Respondent has not met its burden of proving that the replacements were hired as permanent replacements. See *Consolidated Delivery & Logistics*, 337 NLRB 524, 526 (2002) and cases there cited.

law, was permitted to be free during the day if he was working (Tr. 49-51). On March 14, employee Steve Uher returned to work. At the time of the strike, Uher was on layoff status, but he agreed to return to work after being contacted by Respondent (Tr. 52-53). No replacements had been hired when Domrose and Uher returned to work (Tr. 51). On April 7, employee Shawn Buscher abandoned the picket line and returned to work. He was the son of Respondent's assistant plant manager (Tr. 53-54). On August 7, employee Bennie Johnson abandoned the picket line and returned to work (Tr. 55). Before they returned to work, each of the crossovers signed a notice, prepared by the Respondent, resigning from the Union (Tr. 90-91, GCX 17).

Respondent initiated the idea of union resignations. A fact sheet distributed to the employees on March 10, the first day of the strike, asks and answers the questions, "can I avoid union fines and still work?" and "how do I resign from the union?" RX 1. There is no evidence that those questions were raised by employees or that the Union threatened fines for not participating in the strike.

None of the crossovers testified about the circumstances of their return to work; indeed, they did not testify at all in this proceeding. Respondent's vice-president, Kevin Peura, however, did testify on this point. He testified that he called Uher, who was on layoff status, and asked whether Uher was interested in coming to work (Tr. 52). The circumstances of the other returns to work are unclear. It is clear, however, that Peura was instrumental in securing the resignations of the crossovers from the Union, prior to their return to work. Peura's own testimony confirms that the idea came from Respondent and not the employees. He admitted that, at least with respect to the first 2 crossovers, he initiated the notion of resigning from the Union and that Respondent drafted proposed resignation notices and provided them to the crossovers (Tr. 90-91). As Respondent concedes (Br. 8 n. 2), it provided the resignation forms to these employees at its own "initiative." I reject and discredit Peura's further testimony suggesting that the other 2 crossovers requested resignation notices from him because they were concerned about retaliation from the Union for crossing the picket line. The only other record evidence even remotely on point is Union President Nuernberg's candid admission that the crossovers may have been the targets of name calling on the picket line, including the word "scab." Tr. 130-131. Presumably this occurred after the crossovers had already resigned, but, in any event, it is a far cry from establishing that there were threats of retaliation prior to the resignations—or, indeed, at any time—or, more importantly, a causal connection between whatever happened on the picket line and the resignations. Peura's testimony in this respect seemed halting, ambiguous and evasive. Nor is it plausible that the last 2 crossovers would themselves, and on their own, initiate a request of Respondent to help them resign from the Union, especially in circumstances where the Respondent had already drafted a notice of resignation and initiated the idea with respect to the first 2 crossovers—facts that would undoubtedly have come to their attention. It is more likely that Peura handled all the crossover resignations the same way and I so find. All of the objective circumstances—Respondent's distribution of the fact sheet, the absence of any employee inquiries about resignations, Peura's testimony, and the setting itself—warrant the inference,

which I make, that the employees could reasonably view the union resignations as a condition for their return to work.[2]

2. Changes in Wage Rates and Benefits of Crossover Employees

When they returned to work, Domrose and Uher returned to their former jobs and were paid at the same rates they were paid before the strike (Tr. 55). Some time later, they were promoted to leadman positions and they were paid $10.50 per hour. That was different than the rate previously paid to leadmen and that in the final offer, but it was the normal leadman's pay after the strike (Tr. 80). Buscher, who was a general laborer earning $8.50 per hour prior to the strike, returned to that job and that same rate of pay. Shortly thereafter, however, he was promoted to a machine operator's position and increased to $9.00 per hour (Tr. 76-77). This was the so-called "going rate" for all machine operators, including replacement employees working as machine operators (Tr. 77). Johnson, who was a machine operator (welder) making $9.58 per hour prior to the strike, returned to that same position when he abandoned the strike, with the same pay (Tr. 73). Sometime thereafter, he suffered a loss in pay, without any change in duties, to $9.00 per hour. This was because the going rate for machine operators after the strike was $9.00 per hour.

The wage rates for machine operators and leadmen after the strike, set forth above, were different than those paid prior to the strike and those set forth in the Respondent's December 19 final offer (GCX 3). Prior to the strike and under the terms of Respondent's December 19 final offer, the employees were paid at wage rates of between $7.50 and $11.50 per hour and team leaders were to retain their current rate up to a maximum of $16.50 per hour. The Respondent concedes that it paid the crossovers at essentially the same rates as the replacement employees and that it did not notify the Union of any changes in wage rates for the crossovers or offer it an opportunity to bargain over those changes.

Still later, on January 1, 2004, Respondent increased the health and dental insurance premiums that crossovers and replacements were required to pay for their coverage. It is admitted that Respondent did not give prior notice of this change, at least as it applied to the crossovers, to the Union or offer it the opportunity to bargain about the change. Tr. 89

3. Respondent Withdraws Final Offer, Strike Ends and Employees Locked Out

On July 15, 2003, Respondent's attorney and chief negotiator wrote a letter to the Union's chief negotiator withdrawing its outstanding offer of December 19, 2002, which, according to the letter, "means that no offer is currently on the table." The letter

[2] I make this finding even though Peura later offered a conclusory denial that he specifically told employees, in so many words, that they had to resign in order to return to work (Tr. 171). In view of my overall assessment of his reliability, I am doubtful of his testimony on this point. But even if he did not use those exact words, the setting and the circumstances were such that the employees would get that message.

indicated that Respondent would be developing a new offer reflecting reductions in wages and benefits because of its "financial condition." The letter ended by stating that Respondent would forward that offer "and some proposed meeting dates . . . as soon as possible." GCX 8. Respondent did not submit another offer or contact the Union about meeting dates until November 2003.

On October 29, 2003, the Union wrote a letter to Respondent informing it that the Union was terminating the strike and making "an unconditional offer to return to work immediately." The letter asked Respondent to notify each employee when it wanted him to return to work and offered assistance in reaching employees if Respondent needed it. GCX 9.

Respondent answered the Union's letter by one of its own dated November 3, 2003. In that letter, Respondent stated that it "cannot accept the offer in your letter at this time." It stated that Respondent "has decided to impose a temporary lockout until an agreement on a new labor contract is reached." The letter went on to state that Respondent needed deeper cuts than those reflected in its withdrawn December 19, 2002 offer. It also stated that it could not afford to bring employees back and risk the possibility of another strike, but it did not ask for a no-strike pledge either in the letter or thereafter (Tr. 87, 104). The letter concluded by suggesting that the parties ask the mediator to help establish new bargaining dates and stating that Respondent "can provide a new contract offer at that time." GCX 10.

The Union replied by letter dated November 6, 2003, in which it confirmed its offer to return to work on behalf of all striking employees. Among other things, the Union stated its disagreement with Respondent's expressed position that the strikers were economic strikers. The Union set forth its view that the employees were unfair labor strikers, consistent with charges it had filed with the Labor Board the day before, and stated that "all unfair labor practices must be remedied."[3] It also asked for financial information in support of Respondent's representations on the condition of the business and expressed its willingness to meet with the mediator after receiving the information. GCX 11.

On November 17, 2003, Respondent wrote a letter to the Union enclosing financial information the Union had requested and a new bargaining proposal (Tr. 205, RX 7). Two days later, on November 19, the parties met briefly and Respondent submitted an amended bargaining proposal (Tr. 88, GCX 12). The bargaining proposal, at least on wages, basically tracked the wages that were paid to the replacements and crossovers. The parties met again in January 2004 without success. At the time of the trial, the parties had not yet concluded a collective bargaining agreement. Tr. 88-89.

[3] The Union filed charges alleging other violations of the Act, including bargaining violations, by Respondent, but the General Counsel dismissed those charges (GCX 21).

B. Discussion and Analysis

1. Unilateral Changes vis-a-vis the Crossover Employees

As shown above, both before and after the lockout, the Respondent made unilateral changes with respect to bargainable matters involving crossover employees. Thus, before the lockout, the Respondent dropped the wage rate of one crossover employee, Bennie Johnson, and changed the wage rates of machine operators and leadmen from what they had been before the strike and in the December 19 final offer. Those new rates reflected the Respondent's position that crossovers were to be paid the same wage rates that applied to the replacement employees. Likewise, after the lockout, in January 2004, Respondent changed the health and dental insurance premium paid by the crossovers, which matched that to be paid by the replacement employees. All of these changes were made unilaterally, and, admittedly, no effort was made to notify the Union or give it an opportunity to bargain over the changes.

While an employer may unilaterally set and change wages, benefits and terms of striker replacements without bargaining with the striking union that represents its employees, it may not do so with respect to crossovers—former strikers who have abandoned the strike. Such unilateral changes are violative of Section 8(a)(5) and (1) of the Act. *River City Mechanical*, 289 NLRB 1503, 1505 (1988) *Schmidt-Tiago Construction Co.*, 286 NLRB 342, 343 (1987); *Marbro Co*., 284 NLRB 1303 (1987); and *Chicago Tribune Co.,* 318 NLRB 920, 928 n. 30 (1995).

Respondent does not dispute that it made unilateral changes in the health benefits of the crossover employees, and, except for arguments made against the application of the above legal principle, which are discussed below, it offers no defense to the allegation that those changes violated the Act. It does make a more spirited defense to the allegation that it unilaterally changed the wage rates of the crossovers, although it does not dispute that it reduced crossover Johnson's wage rate, sometime after he returned to work, to the level applied to all replacement employees in his job category. Respondent concedes that, at least in this respect, it may have violated the Act (R. Br. 12). But it seems to defend the other allegations as to wage rate changes by asserting that they were "reasonably contemplated" by its December 2002 final offer. It also attempts to make a distinction between what it initially paid the crossovers—their old rates—and what it later paid the crossovers—new rates justified by promotions.

I cannot accept the Respondent's position. Although it initially put the crossovers into their old job categories at the same rates of pay they were receiving before the strike, it is clear, from what happened to them afterwards, that Respondent was using different wage rates than those that were applicable before the strike and contained in the final offer. This is shown most dramatically by Johnson's reduction in pay, reflecting the different pay rate for machine operators. But not only that rate, but other rates, reflected so-called going rates—different going rates—that applied also to replacement employees. For example, when 2 crossovers were promoted to leadman positions, they were apparently capped at the then-going rate—$10.50 per hour. The final offer, on the other hand, contained a range that was capped at $16.50 per hour for that position. The same is true for the machine operators' position. After the strike, the rate was

$9.00 per hour; before the strike and in the final offer, the rate ranged from $9.50 to $11.50 per hour. These are not insubstantial changes and they cannot be viewed as "reasonably contemplated" in the final offer.

Respondent erroneously focuses on the actual pay of the individual crossovers rather than the wage rates applicable to their job categories.[4] It may well be, as Respondent seems to contend, that the change in wage rates for the machine operators and the leadmen would have made no difference, as a remedial matter, in the pay of 3 of the crossovers (Johnson, however, clearly suffered a loss). Such remedial issues may be addressed in the compliance phase of this case, but they do not provide a defense to Respondent's unilateral conduct. What is clear is that the applicable wage rates were changed substantially from what they were in the final offer and they were changed unilaterally. When viewed in this light, it is obvious that the Union had an interest in preserving the wage rates that it had negotiated over a period of years and that were reflected, at least in some respects, in the final offer. Respondent's failure to notify the Union and give it an opportunity to protect its interest was thus violative of the Act, under the authorities cited above.[5]

Respondent does not seriously dispute the applicable law set forth above. In its briefs, Respondent appears to make an effort to distinguish this case from the above cases, but offers nothing that would provide a relevant basis for ruling differently in the instant case than in the prior cases. Contrary to Respondent's contention in its reply brief (R. Br. 3-9), the applicable cases do not require a specific showing by the General Counsel that the unilateral changes would be amenable to bargaining or that the interests of the crossovers are not in conflict with those of the striking union. The Respondent also asserts that, in this case, the interests of the crossovers and the Union were in conflict because of alleged picket line misconduct. That assertion rings particularly hollow here, where the evidence shows that Respondent affirmatively solicited union resignations prior to bringing the crossovers back to work and that any

[4] At one point in its opening brief (Br. 8 n. 1), Respondent seems to contend that it paid the crossovers the wage rates in its final offer rather than those operative before the strike. That contention is not supported by the record references to Peura's testimony in Respondent's brief. I nevertheless have difficulty understanding the semantic jousting between General Counsel and Respondent on this point because, except for Johnson, the actual pay of the crossovers is not particularly significant. What is significant are (1) the wage rates applicable to the crossovers, which, as Respondent admitted, were the same as those applicable to the replacements; and (2) the wage rates in the final offer. In any event, as General Counsel rightly points out in its reply brief (GC R. Br. 2-3), Respondent admittedly paid the crossovers their prestrike wage rates rather than the wage rates in the final offer, citing Respondent's position statement (GCX 18) and testimony by Respondent's attorney, Jonathan Levine (Tr. 246-247).

[5] I make no findings as to whether Respondent instituted new job classifications not reasonably contemplated in the final offer. The evidence on this point was far from clear, and, as Respondent rightly observes, no specific allegation on this matter appears in the complaint.

alleged picket line misconduct had nothing to do with such resignations. See a fuller discussion of this issue elsewhere in this decision. [6]

In essence, Respondent relies on the dissenting opinions in *River City*, *Schmidt-Tiago* and *Marbro* in support of its position that crossovers should be treated the same as replacement employees with respect to unilateral changes (Br. 52-54). Respondent thus argues against any bargaining obligation with respect to crossovers, which raises policy issues that would require a change in Board law. This is, of course, beyond my authority to effectuate because I am bound to apply existing Board law. See *Iowa Beef Packers*, 144 NLRB 615, 616 (1963).[7]

Accordingly, I find that, by making unilateral changes in the wage rates and benefits of the crossover employees, Respondent violated Section 8(a)(5) and (1) of the Act.

2. The Legality of Respondent's Reaction to the Union's Offer to Return to Work After the End of the Strike

As shown above, Respondent rejected the Union's offer to end the strike and, on behalf of the striking employees, to return to work unconditionally, and, instead, locked out those employees. This presents three questions: (1) Was the Union's offer to return to work unconditional, as the General Counsel contends, or conditional, as Respondent contends; (2) Was the lockout unlawful because Respondent did not clearly and fully inform the Union of what was necessary to end the lockout; and, alternatively, (3) Was the lockout unlawful because Respondent implemented it discriminatorily or for discriminatory reasons in order to discourage union activities. I now turn to these questions.

---

[6] Respondent's contention that the interests of the crossovers were in conflict with those of the Union because the Union engaged in picket line misconduct in this case fails for other reasons. As a preliminary and procedural matter, although the parties cite to GCX 21 as containing charges to that effect and the resolution of those charges, my copy of the exhibit contains no such charges or dispositions. In any event, Respondent concedes that whatever charges of this type were filed against the Union, they were resolved by settlement. In these circumstances, the underlying charges (which were never litigated) may not be used to show the truth of those charges. Moreover, there is no record evidence that shows picket line misconduct of the kind Respondent asserts in its reply brief.

[7] Contrary to the Respondent's suggestion (Br. 54), the Board did not, in *Detroit Newspaper Agency*, 327 NLRB 871 n. 1 (1999), affirmatively leave "open" the issue of unilateral changes regarding crossovers. As the Board stated, the issue was not presented so there was no occasion to pass on it or the applicable precedent. There can thus be no doubt concerning the extant Board law on the subject. Even if the Board were to change the law in this regard, however, it is unclear whether the Board would apply such a change retroactively. See *Crown Bolt, Inc.,* 343 NLRB No. 86 (2004) (Slip op. pp. 4-5); *Levitz Furniture Co.,* 333 NLRB 717, 729 (2001).

The propriety of the offer to return

Certain striker reinstatement rights are triggered upon an unconditional offer to return to work. An offer to return to work "will not be treated as conditional unless it gives the employer reason to conclude that any offer of equivalent employment would be rejected." *United States Service Industries*, 315 NLRB 285, 286 (1994), citing authorities. Moreover, an employer may not raise the objection that an offer is unconditional unless it has expressly based its refusal to reinstate upon that ground at the time the offer is refused. See *Colecraft Mfg. Co. v. NLRB*, 385 F.2d 998,1005 (2nd Cir. 1967).

In the instant case, the Union's written offer, set forth in its letter of October 29, 2003, was clearly stated: The employees were offering to return to work immediately and unconditionally. There was no ambiguity in the letter and nothing in the letter could possibly be construed as giving even a hint of any conditions. Accordingly, nothing in the letter could conceivably give the Respondent a reason to conclude that acceptance of the offer would be rejected by the employees. See *United States Service Industries, supra*. Indeed, according to uncontradicted testimony, Union President Robert Nuernberg, who was also employed by Respondent, and another official addressed a meeting of employees before the letter was sent. They told employees that the Union proposed that the employees would return to work "under [Respondent's] terms." Tr. 103. On that basis, the employees thereafter voted to end the strike and return to work, thus precipitating the Union's October 29 offer to return to work unconditionally and immediately. Tr. 103-104. There can thus be no doubt that the offer was unconditional. Nor did the Respondent's November 3 response to the Union's letter question that the offer was unconditional. Indeed, in that letter, Respondent made it clear that it was unable to accept the offer because it was locking out the full-term strikers and union members. Nothing in Respondent's letter raised an objection that the offer was not unconditional. The Respondent has thus waived any subsequently fashioned and advanced reason for refusing the Union's offer because it was assertedly conditional. See *Colecraft, supra.*

At no time between the receipt of the Union's offer to return in early November 2003, and the beginning of the litigation of this case did the Respondent take the position that the Union's offer was conditional. Only when it filed the answer in this case, on June 29, 2004, did it raise the matter. In its opening brief (Br. 49-50), Respondent contends that a November 6, 2003 letter from the Union asserting that the strike was an unfair labor strike and stating that all alleged unfair labor practices must be remedied modified the original offer of October 29, 2003 and made it conditional. That assertion not only comes too late, not having been raised at or anywhere near the time the offer was made, but it is also unavailing on the merits. Contrary to the circumstances set forth in *H. & F. Binch Co.,* 188 NLRB 720 (1971), the case cited by Respondent in support of its position, here, the Union's views about the Respondent's alleged unfair labor practices were not tied to its offer to return to work. See *Capehorn Industry*, 336 NLRB 364 at n. 4 (2001). And, contrary to Respondent's assertion in its reply brief (R. Br. 27-28), nothing in either the Union's offer to return or its subsequent letter of November 6 indicated that the offer was conditioned on the immediate discharge of permanent replacements. Indeed, in a November 17 letter, Respondent

addressed the information request in the Union's November 6 letter, but it did not address the Union's statement about Respondent's alleged unfair labor practices in that same letter, thus demonstrating that the statement was not thought to be significant. In any event, the Union's statement in its November 6 letter about the Respondent's unfair labor practices was simply a response to the Respondent's contention, in its letter of November 3, that the strike was an economic strike. There was no mention of replacements at all; indeed, as the Union points out, and as I have indicated in footnote 1 above, there is no record evidence establishing that the replacements were permanent. Finally, the Union's statement does not amount to a condition at all; at most, it is a statement that Respondent should comply with the law, one of numerous rhetorical statements of position exchanged between the parties at this time. In these circumstances, I find that the Union's offer to return was unconditional.

Whether the employees were clearly and fully informed of the conditions they needed to meet to end the lockout

In order to justify a refusal to reinstate economic strikers upon their unconditional offer to return to work, an employer must demonstrate a legitimate and substantial business justification for doing so. *Dayton Newspapers, Inc.,* 339 NLRB No. 79 (2003) (Slip op. p. 7) and cases there cited. Such justification may be shown by the imposition of a lawful lockout. But a prerequisite for a lawful lockout in these circumstances is that the employer inform the union representing its employees and offering, on their behalf, to return to work of its demands "so that the [u]nion can evaluate whether to accept them and obtain reinstatement." Thus, "the employees must not only be informed that they are locked out, but they must be clearly and fully informed of the conditions they must meet to be reinstated." *Dayton Newspapers, supra*, 339 NLRB No. 79, at slip op. p. 7. Failure to meet these requirements leads to a finding that the employer did not have a legitimate and substantial business justification for rejecting an unconditional offer to return to work or imposing a lockout in response to the offer. *Ibid*.

In this case, as in *Dayton Newspapers*, the employer responded to an offer to return to work by locking out the employees. Here, the lockout came immediately after the Union's unconditional offer to return to work. Moreover, the Respondent had withdrawn its previous bargaining proposal, and, at the time it rejected the Union's offer to return and announced its lockout, it had no bargaining proposal on the table. Indeed, at the time the Union ended the strike, Respondent had had no bargaining proposal on the table for over 3 months. Respondent made no further proposal until some 2 weeks after its announcement of the lockout. Thus, the employees, who had agreed to return to work on Respondent's "terms," that is, the same wages, benefits and conditions that were applicable to the replacements and the crossovers, had no way to obtain reinstatement and end the lockout. Indeed, this case is a stronger one for a violation than *Dayton Newspapers* because, in that case, the Board found that the conditions set forth by the employer for reinstatement amounted to a "moving target." Here, there was no target at all. The Union had no bargaining proposal to accept and neither the Union nor the employees could do anything to remove the lockout and get the Respondent to consider their offer to return to work on the merits. In this respect, the instant case is much like *McGwier Co*., 204 NLRB 492, 496 (1973), where the Board rejected the employer's contention that its lockout, in response to an unconditional offer to return to

work, was taken to enhance its bargaining position because, as the Board stated, at the time, "no bargaining position had been taken."

Respondent offers a diffuse and scattergun series of arguments in an attempt to distinguish *Dayton Newspapers*, but none are persuasive or particularly relevant. The arguments basically allege that the lockout was imposed to enhance its bargaining position—a position that it advanced in a bargaining proposal submitted about 2 weeks after the lockout; its position was taken in good faith and, although regressive, its bargaining proposal was justified by its having weathered a strike; and the Union was not going to accept that proposal—and, indeed, did not, in the bargaining that followed the lockout. None of these arguments really addresses the operative legal principle of *Dayton Newspapers,* that is, whether the Union and the employees it represented were given the means to end the lockout and obtain the reinstatement they requested. The General Counsel is not alleging that Respondent bargained in bad faith, except with respect to the unilateral changes involving the crossovers; and the cases that address the legality of regressive bargaining proposals after weathering a strike deal essentially with whether such bargaining proposals violate Section 8(a)(5) and (1) of the Act, an issue not presented in this case. Nor, contrary to the Respondent's suggestion, can indefinite and general statements in its July 15 letter withdrawing its final offer or in its November 3 letter announcing the lockout operate to justify the lockout. Those statements simply requested further concessions, without mentioning any specifics; those specifics came only in Respondent's November 19 bargaining proposal, two weeks after the lockout was imposed. The statements were thus hardly sufficient to "clearly and fully" inform the employees what it would take to lift the lockout and return them to work.

Respondent also seems to assert that, since the Union was unwilling to accept its regressive proposal 2 weeks after the lockout, it would have been futile to make that offer when it locked out the full-term strikers. But this begs the question. Those employees had voted to accept whatever terms Respondent would set for their return to work. That is what made the offer unconditional. Respondent did not test the Union's unconditional offer to return by accepting it and seeing whether the full-term strikers would indeed accept the same wages, terms and benefits that applied to the replacements and crossovers. Instead, the Respondent locked out the full-term strikers, thus precluding such a test. Moreover, the fact that the Union eventually rejected the Respondent's offer in the context of collective bargaining does not mean that the employees would have been unwilling to return to work under those terms. Having made an unconditional offer to return to work, the employees were entitled to return to work, and, from that position, bargain for a better, or at least a different, deal. Respondent's rejection of the unconditional offer to return to work and its imposition of the lockout effectively denied them that opportunity. It is thus not sufficient that Respondent put a bargaining proposal on the table 2 weeks later. To rule otherwise would not only require the locked-out employees to be unusually prescient, but would severely restrict their right to return to work and to bargain collectively while working rather than while striking.

In sum, the Respondent's rejection of the full-term strikers' unconditional offer to return to work and its imposition of a lockout, without clearly and fully informing them

how they could end the lockout and return to work, did not constitute a legitimate and substantial justification for its actions. Accordingly, by such conduct, Respondent violated Section 8(a)(3) and (1) of the Act.

Whether the Lockout was Discriminatorily Motivated

As a general matter, an employer may impose a lockout after a lawful impasse "for the sole purpose of bringing economic pressure to bear in support of his legitimate bargaining position." *American Ship Building*, 380 U.S. 300, 318 (1965). But it cannot impose a lockout discriminatorily or for discriminatory reasons. *Tidewater Construction Corp.,* 341 NLRB No. 55 (2004). A divided Board recently held that simply applying the lockout to full-term strikers and not applying it to nonstrikers and crossovers—a partial lockout—was not sufficient, in and of itself, to show that a lockout was unlawfully discriminatory. But it also recognized that other evidence of discrimination might make such a partial lockout unlawful. *Midwest Generation, EME, LLC,* 343 NLRB No. 12 (2004) (Slip op. pp. 1-5).[8] See also *Allen Storage and Moving Co.*, 342 NLRB No. 44 (2004) (Slip op. p. 1) (disparate treatment of strikers and nonstrikers indicative of unlawful motive). In *McGwier, supra,* a case not addressed and left undisturbed in *Midwest Generation*, but cited with approval in *Allen Storage,* the Board held that a combination of imposing a lockout in the absence of bargaining proposals and locking out only union members and permitting nonstrikers to continue working establishes discriminatory motive, which renders the lockout unlawful.

In this case, the Respondent imposed its lockout without having a bargaining proposal on the table, thus depriving employees the means for ending the lockout and returning to work, and it applied the lockout to full-term strikers, while permitting crossovers to continue to work. Under *McGwire*, these factors are sufficient to support a finding that the lockout was discriminatory. But, here, there is even more. An important additional piece of evidence in support of a finding of discriminatory motive is Respondent's role in soliciting employees to resign from the Union in order to return to work, as shown by my findings set forth above. Respondent initiated the matter of resignations in the absence of any employee inquiries about resignations, and, inferentially at least, tied the matter to a return to work. It is clear that, as a general matter, employer solicitations of employees to resign from a union, when they involve more than ministerial assistance in response to employee inquiries, are coercive and violative of Section 8(a)(1) of the Act. *Florida Wire & Cable, Inc*., 329 NLRB 378, 381 (2001); *Schenk Packing*, 301 NLRB 487, 489 (1991); and *Manhattan Hospital*, 280 NLRB 113, 114-115 (1986), enfd. mem. 814 F.2d 653 (2nd Cir. 1987), cert. denied 483 U.S. 1021 (1987).[9] Although Respondent's conduct in obtaining the union resignations

[8] *Midwest Generation* was decided on a stipulated record without the benefit of a trial.

[9] In its reply brief (R. Br. 17-18), Respondent argues, contrary to the above authorities, that the Board does not view the absence of employee inquiries as a legal impediment to employer solicitation of union resignations. Respondent is wrong and the authorities it cites do not support its argument. For example, in both *Mosher Steel Co*., 220 NLRB 336, 337 (1975) and *Payless Drug Store*, 210 NLRB 134, 136 (1974), the relevant allegations were dismissed precisely because there were employee inquiries. The same is true in *Peoples Gas Systems*,

Continued

was not specifically alleged as an unfair labor practice, the evidence is certainly relevant in determining union animus, which is an issue in this case.[10]

The Respondent's solicitation of these resignations was at its initiative, coercive and, in the circumstances, indicative of union animus that undoubtedly affected the motive for the lockout. The solicitations were not made in isolation. The message to the crossovers was clear: To return to work you must resign. Nor is it significant that the solicitations took place before the lockout itself, although they took place over a four-month period, the last of which occurred in August. The same crossovers, whose union resignations were solicited before they returned to work, remained employed during the lockout, while the full-term strikers were not permitted to return to work. The solicitation of union resignations thus distinguishes this case from *Midwest Generation*, the case chiefly relied upon by Respondent, and brings it into the orbit of *Allen Storage*, which relied on *McGwire* to support a finding of discrimination. Indeed, although not as directly tied to the lockout, the solicitations in this case are comparable to those in

---

275 NLRB 505 (1985), also cited by Respondent. But that case is inapposite for other reasons. First, the employer's advice to employees was not given in the context, as it was here, of attempting to get strikers to return to work. That case involved advice by an employer about revoking checkoff authorizations and resigning from the union under an existing collective bargaining agreement. Moreover, unlike here, in *Peoples Gas*, the employer did not treat employees who resigned differently from those who did not. Finally, as indicated, there were, in *Peoples Gas*, inquiries from employees. Although, in dictum, the Board seemed to suggest that it would have come out the same way in the absence of employee inquiries, even that suggestion was limited. At footnote 4, the Board stated that its view was supported by the "extremely short periods of time provided by the contracts for revoking checkoff authorizations." That dictum, in any event, stands in isolation and is contrary to the subsequent authorities cited above in text.

[10] It is unclear, from the General Counsel's briefs, whether he is urging that I find a separate violation of the Act in this respect (See GC R. Br. 3, 14, 15). Without a more definitive position from the General Counsel, I do not go that far, although the issue was fully litigated and most of the evidence, including a crucial admission, came from the mouth of Peura, Respondent's vice-president. See *Airborne Freight Corp.*, 343 NLRB No. 72 (2004) (Slip op. p. 2), and the case cited therein. What I do find is that Respondent's conduct with respect to the union resignations shows union animus and discrimination relevant to explain the motive and purpose of the lockout, an issue clearly presented not only by the complaint, but by one of Respondent's affirmative defenses set forth in its answer—that it acted for "legitimate and non-discriminatory reasons." GCX 1 (g) and (i). In his opening statement, counsel for General Counsel initially seemed to rely primarily or perhaps even exclusively on Respondent's failure to lock out the crossovers to show unlawful motive. In response to my question about the relevance of the union resignations to this issue, however, he said he was going to present evidence on why the crossovers returned to work (Tr. 22-23). The General Counsel later elicited Peura's admission and other testimony about the union resignations. Although perhaps the General Counsel should have amended the complaint at this point to allege a separate violation concerning the union resignations, he did thereafter rely on the evidence to show unlawful motive. Indeed, both at the hearing and in their briefs, all parties clearly addressed the issue on the merits. Thus, the issue of the union resignations was fully litigated at least on the question whether Respondent's role in securing union resignations amounted to union animus. In its briefs, Respondent does not contend otherwise.

Schenk Packing, supra, where the Board, relying primarily on the unlawful solicitation of union resignations, found that "an unavoidable effect, and, hence, unstated purpose of the lockout was to discourage unit employees' membership in the Union by denying employment to those who maintained that status." *Id*. 301 NLRB at 490.

Two other pieces of evidence distinguish this case from *Midwest Generation* and show unlawful motive. First, as I have found, Respondent made unlawful unilateral changes in the wage rates and benefits of crossover employees. This is particularly significant because the Respondent exempted the crossovers from the lockout and withheld a bargaining proposal from the Union for a significant period of time, until 2 weeks after the imposition of the lockout. See *Allen Storage, supra*, where the Board found that a lockout in the face of an unremedied bargaining violation was inconsistent with *American Ship Building, supra*, and enough, along with the disparate treatment of strikers and nonstrikers, to render the lockout unlawful. Moreover, it appears that when the Respondent did submit a bargaining proposal to the Union after the lockout—on November 19, 2003, the proposal contained some provisions that offered the Union less than what was being paid to the replacements and the crossovers. The offer of November 19 provided that employees would be paid a maximum of $250 per month per employee towards the purchase of health and dental insurance (GCX 12, p. 15). However, it was apparently already paying more than that for the health insurance of 3 replacements (Baty, Henderson and Perkins) and of 1 crossover (Johnson) (CPX 3). It is well settled that offering higher wages and benefits to strike replacements than are proposed to a union during negotiations amounts to a violation of the Act. Indeed, such conduct has been found to be inherently destructive of important employee rights and thus discriminatory under Section 8(a)(3) and (1) of the Act. *Burlington Homes, Inc.,* 246 NLRB 1029, 1030 (1979). Here again, there was no separate allegation of a violation in this regard, but the record evidence clearly supports an inference of union animus and discrimination. In refusing to bargain about the wages and benefits of the crossovers and offering the Union less in benefits than it was paying to the crossovers and replacements, Respondent was undercutting the Union's position as bargaining agent and punishing the full-term strikers for striking.[11]

Respondent has not effectively countered such evidence or established that the "sole" reason for the lockout was to support its bargaining position. That position was unspecified and undefined from July 15 until the lockout was imposed and only made

[11] Respondent does not dispute the evidence concerning health and dental benefits, set forth above. And its counter to such evidence (R. Br. 25) is unavailing. First, it asserts that this was part of the Union's allegation of bad faith bargaining, which was dismissed by the General Counsel. While that may be true, the evidence is not being used here to support a bargaining violation and I make no finding of a bargaining, or any other, violation, based on such evidence. But I cannot be blind to the evidence itself as it bears on union animus and discrimination, prime issues in this case. Nor is there merit to Respondent's contention that, had the Union accepted its contract proposal, all the employees—replacements, crossovers and union members—would have been covered by any resulting contract. This would have meant an appreciable cut in benefits for some replacements and one crossover, but the Respondent's contention is not evidence; and it is too speculative upon which to base findings of fact or conclusions of law. The bottom line is that its proposal was discriminatory.

explicit two weeks after the lockout. Moreover, the lockout was imposed immediately after receipt of the offer to return. Before the lockout, Respondent had been content to have no bargaining proposal on the table for over 3 months. Only after it was presented with the real possibility of reinstating the full-term strikers did it take steps to lock them out, and, belatedly, prepare a bargaining proposal. Indeed, since the proposal, at least on wages, basically tracked what was being paid to replacements and crossovers, there was no reason why it could not have been presented 3 months earlier. This suggests that Respondent was less interested in getting a contract than in punishing the union members who had ended their strike.

In these circumstances, Respondent's conduct, considered in its entirety, leads to the inference, which I make, that Respondent was less interested in getting the Union to accept its bargaining position than in undermining the Union, punishing union members for striking, and depriving them of their lawful reinstatement rights. Respondent's lockout was thus not imposed "solely" in support of its bargaining position under *American Shipbuilding*. It was discriminatory, unlawfully motivated and violative of Section 8(a)(3) and (1) of the Act.

Conclusions of Law

1. By unilaterally changing the wage rates and benefits of crossover employees represented by the Union without giving the Union notice and an opportunity to bargain over the changes, Respondent violated Section 8(a)(5) and (1) of the Act.

2. By refusing to reinstate striking employees upon their unconditional offer to return to work and locking them out, Respondent violated Section 8(a)(3) and (1) of the Act.

3. The above violations constitute unfair labor practices that affect commerce within the meaning of the Act.

Remedy

Having found that Respondent violated the Act in certain respects, I shall recommend that it cease and desist from engaging in such violations, take affirmative action to remedy them, and post and mail an appropriate notice.[12] To remedy its unlawful unilateral changes, Respondent will be required to negotiate with the Union over such changes and make employees whole for any loss of earnings and benefits they may have suffered as a result, based on applicable law. See *Chicago Tribune, supra*, 318 NLRB at 928 and cases there cited. In addition, the order will include a requirement that Respondent offer reinstatement to the striking employees in accordance with applicable law. If there were vacancies as of October 29, 2003, the date on which they made an unconditional offer to return to work, in positions for which

[12] Respondent will be ordered to mail the notices to the full-term strikers since they were unlawfully locked out and thus cannot be notified through the traditional notice posting at their work site.

the strikers were qualified, they are entitled to immediate reinstatement and to be made whole for any loss of earnings or benefits they may have suffered for not being properly reinstated. In the event that there were no such vacancies as of October 29, 2003, because all positions were occupied by permanent replacements, the strikers would be entitled to reinstatement and appropriate back pay as of the time the permanent replacements left and vacancies became available. See *NLRB v. Fleetwood Trailer Co*., 389 U.S. 375, 378 (1967) and *Laidlaw Corp*., 171 NLRB 1366 (1968), enfd. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1970). Since the record evidence in this case is insufficient, at this point, to make a determination as to whether any replacements employed as of October 29, 2003 were temporary or permanent, that issue may be considered in the compliance phase of this case. See footnote 1 of this decision and *Consolidated Delivery, supra*, 337 NLRB at 526, cited therein. Any backpay due, less interim earnings, shall be computed in accordance with *F.W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed under *New Horizons for the Retarded,* 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended[13]

ORDER

The Respondent, Milwaukee Dustless Brush Company, its officers, agents, successors and assigns, shall

1. Cease and desist from

(a) Making unilateral changes in wage rates and benefits of crossover employees represented by the Union without notifying the Union or giving it the opportunity to bargain over such changes.

(b) Discriminating against employees by refusing to reinstate full-term strikers who have made an unconditional offer to return to work and locking them out because they have engaged in protected or union activity and in order to discourage such activity.

(c) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act

[13] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions and recommended order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Before implementing any changes in wage rates or benefits for crossover employees, notify, and, on request, bargain with the Union over such changes, and make whole any crossovers who suffered any loss of earnings or benefits as a result of Respondent's unlawful unilateral changes, in the manner set forth in the remedy section of this decision.

(b) Within 14 days from the date of this order, offer all locked out employees who were not permanently replaced as of October 29, 2003, full reinstatement to their former jobs, or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or benefits previously enjoyed. To the extent that such employees were permanently replaced as of the above date, the locked out employees shall be offered such reinstatement as of the date that the permanent replacements leave or vacancies arise. Respondent shall make any such employees denied proper reinstatement whole for any loss of earnings and other benefits they may have suffered as a result of the discrimination against them, in the manner set forth in the remedy section of this decision.

(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide, at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this order.

(d) Within 14 days after service by the Region, post at its Milwaukee, Wisconsin, facility copies of the attached notice marked "Appendix."[14] Copies of the notice, on forms provided by the Regional Director for Region 30, after being signed by the Respondent's authorized representative, shall be posted by Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since November 5, 2003. Because full-term strikers, who were the subject of unfair labor practices, have not yet been reemployed, the notice shall also be mailed to them; the Regional Director shall supply the addresses of those employees to the Respondent.

[14] If this order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official, on a form provided by the Region, attesting to the steps that Respondent has taken to comply.

Dated, Washington, D.C. December 10, 2004

_____
Robert A. Giannasi
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join assist any union
To bargain collectively through representatives
of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT make unilateral changes in wages rates and benefits of crossover employees represented by the Union (PACE Local 7-0852) without notifying the Union or giving it the opportunity to bargain over such changes.

WE WILL NOT discriminate against employees by locking out union members and refusing to reinstate them upon their unconditional offer to return to work because they have engaged in protected or union activity and in order to discourage such activity.

WE WILL NOT, in any like or related manner, interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL notify, and, on request, bargain with the Union over any changes in wage rates or benefits of crossover employees before implementing them; and WE WILL make whole any crossovers who suffered any loss of earnings or benefits as a result of our unlawful unilateral changes with respect to those employees.

WE WILL offer all locked out employees who were not replaced, as of October 29, 2003, full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions. To the extent that employees were permanently replaced as of that date, the locked out employees will be offered such reinstatement as of the date the permanent replacements leave or vacancies arise; and WE WILL make any employee denied proper reinstatement whole for any loss of earnings or benefits they may have suffered from an improper denial of reinstatement.

MILWAUKEE DUSTLESS BRUSH COMPANY
(Employer)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered with any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 310 West Wisconsin Ave., Suite 700, Milwaukee, Wisconsin 53203–2211, Telephone 414–297–1819.